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IN THE

Supreme Court of the United States

1940 TERM

No. 530

CHARLES RICHMAN, *Petitioner,*

vs.

ANNE NIELSEN, *as* Administratrix of the Estate of Pearl G. Nielsen, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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ANNE NIELSEN, *as* Administratrix of the Estate of Pearl G. Nielsen, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION

Charles Richman, the Petitioner above named, prays that a Writ of Certiorari issue to review the Judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered August 26, 1940, in the case of Anne Nielsen, as Administratrix of the Estate of Pearl G. Nielsen, Deceased, Appellant, vs. Charles Richman, Appellee, and which Judgment reversed the Judgment of the United States District Court for the District of South Dakota, Southern Division, the Judgment of said District Court being in favor of the Petitioner and against the Respondent.

OPINION BELOW

The Circuit Court of Appeals by its decision reversed the said Judgment of the said District Court, and remanded the said case for a new trial in the said District Court. The decision and Judgment of the said Circuit Court of Appeals was on the merits and final so far as concerns said United States Circuit Court of Appeals, except that Petitioner herein duly made application for a rehearing, which application for a rehearing was denied by said United States Circuit Court of Appeals on September 18, 1940, whereby said proceedings in said United States Circuit Court of Appeals have been terminated, and nothing remains to be done in said United States Circuit Court of Appeals.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925, being Section 347 (a) of Title 28 of United States Code Annotated.

The Judgment sought to be reversed was entered in said Circuit Court of Appeals on August 26, 1940.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Respondent brought this action to recover $10,000.00 alleged damages for the death of Respondent's intestate, Pearl G. Nielsen. The suit was under the South Dakota Wrongful Death Statute, now Chapter 37.22 of the South Dakota Code of 1939, formerly Sections 2929 to 2932 of the South Dakota Revised Code of 1919.

Respondent claimed, in substance, that her intestate was killed in a collision between two automobiles which occurred at a highway intersection near Colman, Moody County, South Dakota, January 13, 1939. Her Complaint charged that such collision and the death of her intestate were caused by negligence of the Petitioner. Petitioner's defense was a denial of negligence on his part, and a plea of contributory negligence on the part of Respondent's intestate.

Upon the trial in the United States District Court the jury was directed by the Court to return a verdict for the Petitioner, this being on the ground that the evidence showed contributory negligence of Respondent's intestate as a matter of law.

On Respondent's appeal to the said United States Circuit Court of Appeals, this decision was reversed, it being held that the question of contributory negligence was for the jury, and further that the facts were such that the case should have been submitted to the jury under the doctrine of the last clear chance.

The opinion was by a divided Court, Circuit Judge Thomas concurring with District Judge Bell in the majority opinion, and Circuit Judge Woodrough dissenting.

QUESTIONS PRESENTED

I.

Whether under the applicable law of South Dakota, being what is commonly known as the Uniform Motor Vehicles Act, a motorist entering from a crossroad into what is known as an arterial highway, has the right-of-way over a motorist approaching on the arterial highway from his left.

II.

Whether such a motorist, entering such an arterial highway, has complied with his statutory duty to stop when he stops at the so-called stop sign, and when the situation is such that an observation from that point would be entirely ineffective, or whether the statutory duty under provisions of the Uniform Motor Vehicles Act is to stop at a point where a reasonably effective observation can be made.

III.

Whether such a motorist, entering such an arterial highway, has complied with his duty to exercise due care when on his only observation of traffic he miscalculates the time when an approaching vehicle will arrive, or whether he should make further observations immediately before entering the zone of danger.

IV.

Whether the doctrine of the last clear chance, as stated by the Circuit Court of Appeals in its decision herein, is not at variance with such doctrine as established by decisions of the South Dakota Supreme Court.

REASONS FOR GRANTING THE WRIT

The applicable statutory law is what is known as the Uniform Motor Vehicles Act. As the accident involved in this case occurred January 13, 1939, the South Dakota Code of 1939 had not then become effective. Such Code in Section 65.0202 (26) provided that the effective date was July 1, 1939. Therefore citations as to statutory law are as the same existed at the time of the accident involved. The statute in question was Chapter 251 of the South Dakota Session Laws of 1929. This is the so-called Uniform Motor Vehicles Act. (See Section 70, Chapter 251, South Dakota Session Laws of 1929, and Uniform Laws Annotated, Volume 11, Pages 8 to 73.)

This Act provides in Section 69 thereof, as adopted by the South Dakota Legislature: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." This same provision appears as Section 90 of the Uniform Act as proposed for general adoption. (11 Uniform Laws Annotated, Page 73)

This Act having received widespread adoption, and the manifest purpose thereof being uniformity of traffic regulations so motorists do not confront varying laws every time a state line is passed, it is highly important that erroneous construction of the statutory provisions should not be promulgated by the Federal Courts. It is further highly important that the Federal Courts should not be at variance with the local construction of the law in any state which has adopted the Uniform Act. Such Law is one that effects all motorists in their conduct upon highways and it is decidedly to the public interest that provisions of the Uniform Act should be correctly construed, and construed

in accordance with the prevailing interpretation thereof, particularly the probable construction by the Courts of the jurisdiction where the controversy originated.

In the present case it is our contention:

I.

The holding of the Circuit Court of Appeals construes the provisions of the Act with reference to arterial highways to the effect that regardless of the arterial character of the highway, a motorist entering the same from a crossroad has the right-of-way over a motorist approaching on the arterial highway from his left. This is completely at variance with the popular conception of an arterial highway and its purposes. It seems to be at variance with the conception thereof of the South Dakota Supreme Court as stated in *Miller v. Stevens*, 63 S. D. 10, 256 N. W. 152.

In view of the widespread establishment of arterial highways under the provisions of the Uniform Motor Vehicles Act, and in view of the "Uniformity of Interpretation" provision of the Act, this construction of the law by the Circuit Court of Appeals, if erroneous, should be corrected.

II.

Section 22 of Chapter 251 of the South Dakota Session Laws of 1929 provides for designation of arterial highways by erecting stop signs, and that "it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto."

The opinion of the Circuit Court of Appeals dealt with a situation where the arterial highway was paved, and where the stop sign, due to presence of filling stations, was eighty-six feet north of the north line of the highway, and one hundred and nine feet north of the north edge of the paving, and where it was conceded a motorist would have practically no view of the arterial highway to the east. It was undisputed that the only stop made by Respondent's decedent was at the stop sign. The Circuit Court of Appeals construes the law to the effect that such a stop meets the requirement of the statute, regardless of the fact no effective observation could be there made. This is at complete

variance with decisions of State Courts construing the same or analogous statutes. The well established rule is that the stop must be made at a point where the motorist can make effective observations.

Findley v. Brittenham, 199 Minn. 197, 271 N. W. 449;
Gumm v. Koepke (Wis. State Report not available) 278 N. W. 447.
Hittle v. Jones, 217 Ia. 598, 250 N. W. 689.
Marciniak v. Sundeen, 278 Mich. 407, 270 N. W. 729.
Miller v. Stevens, 63 S. D. 10, 256 N. W. 152.
Paluczak v. Jones, 209 Wis. 640, 245 N. W. 655.
Pettera v. Collins, 203 Wis. 81, 233 N. W. 545.
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Shoniker v. English, 254 Mich. 76, 235 N. W. 866.
Svenson v. Vondrak, 200 Wis. 312, 227 N. W. 240.
Wood v. Branning, 215 Ia. 59, 244 N. W. 658.

III.

The opinion of the Circuit Court of Appeals is in substance that Respondent's decedent could be excused from looking eastward at any time within the last twenty feet before she drove upon the paving on the hypothesis that she might have seen Petitioner's vehicle at such a distance that it would not, if traveling at a lawful rate of speed, constitute a source of danger, and that she would thereby be excused for not making an observation immediately before going on the paving. This is at complete variance with decisions of the South Dakota Supreme Court which establish in that jurisdiction the duty of a motorist approaching an intersection, and which hold in substance that in such circumstances a final observation should be made before the motorist commits himself to the zone of danger.

Jamieson v. Gerth, 61 S. D. 514, 249 N. W. 921.
Anderson v. Huntwork (not yet in South Dakota Report), 284 N. W. 775.

The decision of the Circuit Court of Appeals being in clear conflict with the decisions of the South Dakota Su-

preme Court in this respect, the decision of the Circuit Court of Appeals should be corrected.

IV.

The opinion of the Circuit Court of Appeals adopted a view of the doctrine of last clear chance that is at manifest variance with the doctrine as followed by the South Dakota Supreme Court, and as followed by previous decisions of such Circuit Court of Appeals.

DeNoma vs. Sioux Falls Traction System, 39 S. D. 10, 162 N. W. 746.

McFarland v. Chicago, M. & St. P. Ry. Co., 51 S. D. 85, 212 N. W. 493.

Miller v. Sioux Falls Traction System, 44 S. D. 405, 184 N. W. 233.

Denver City Tramway Company v. Cobb, 164 Fed. 41.

Walker v. East St. Louis Street Railway Company, 25 Fed. (2) 579.

Wheelock v. Clay, 13 Fed. (2) 972.

V.

The opinion in this case was by a divided Court. One Circuit Judge was for reversal of the decision of the District Court and one was for affirmance of the decision of the District Court. The District Judge sitting favored reversal. Therefore, the net effect is that the ruling of one District Judge is overruled by the views of another District Judge, and important principles of law construing the Uniform Motor Vehicles Act are thereby promulgated. This in and of itself constitutes strong reason for granting certiorari. *Forsyth v. City of Hammond*, 166 U. S. 506, 17 S. Ct. Rep. 665.

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari to review the Judgment of the Circuit Court of Appeals for the Eighth Circuit should be granted.

BLAINE SIMONS,
HOLTON DAVENPORT,
ELLSWORTH E. EVANS,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION

Statement of Case

We will use the abbreviation "R" for the Record.

The accident involved occurred January 13, 1939, at an intersection on the south edge of Colman, South Dakota. Decedent with a younger sister was driving southward on a graveled road, approaching an intersection of an arterial paved highway, on which Petitioner was driving westward.

The north and south road on which Decedent was traveling did not continue to the south of the paved highway. On both corners to the north of the paved highway were gasoline stations. As the north and south road approached the paving, the more heavily traveled portions forked out to the southwest and southeast, respectfully. (R. 19-21).

The north and south road was practically level. Approaching on the paved road from the east there was a slight raise with the peak a quarter of a mile from the intersection. From that point to the intersection the paving was almost level but with a slight downward grade. (R. 21). The stop sign on the north and south road was on the west side thereof at a point 109 feet north of the paving. From this stop sign visibility of the paved road to the east was obscured so that a motorist at the stop sign could see only a comparatively few feet to the east. (R. 30 near bottom of page; see also Exhibit 1, being a map drawn according to scale of 20 feet to the inch and which makes the situation as to visibility manifest).

Descriptive evidence as to the degree of visibility to the east, from various points between the stop sign and the paving, appears at various places in the Record. (R. 27, 30, 44-50, 38, 48, 29 and the various photographs which were introduced.) Summarized, the situation was about as follows: A motorist approaching the intersection from the north, when at a point about 50 feet north of the paving, would have a comparatively clear view to the top of the grade a quarter of a mile away. This would continue until he was at a point about 30 feet north of the paving. Then as he con-

tinued for a distance of about 10 feet, his view would be limited by the obstruction of a line of trees so he could see only from 150 feet to 380 feet, depending on the exact point where he was. At all times from a point 20 feet north of the paving he had a clear view for a quarter of a mile eastward.

There was no dispute as to the movement of the car driven by Decedent. At the stop sign (109 feet north of the paving) the car came to a stop. (R. 42). It then continued onward at 5 to 10 miles an hour, and did not make any further stop. (R. 31, 42). When the front end of the car was about 19 feet north of the paving, which would place the occupants in the front seat 25 feet from the paving, Decedent said, "I don't see anybody, do you?" to which her sister replied, "No, I don't," or something like that. (R. 40). The car then continued onto the paving.

The point of impact was identified by a mark found on the paving following the accident. One witness placed this as a foot to eighteen inches south of the center stripe, and another witness estimated that it was five inches or six inches south of the center stripe. (R. 21-22). The left front end of Decedent's car was struck by the right front wheel of Petitioner's car. (R. 21, 22 and 28). The paving was 20 feet wide. Decedent's car was approximately 14 feet in length. (R. 31). The brakes were in such condition that when applied at a speed of about 10 miles an hour it would stop within 10 feet. (R. 43). Immediately before the crash Decedent's car was following a circular course to the southeast, the front end at the moment of impact reaching a point just south of the center line and twelve feet east of the east edge of the intersection. (R. 22).

Therefore, decedent's car when collision occurred would have been pointed diagonally toward the southeast, with its front end at about the center line, and its rear end at about the north edge of the paving, entirely obstructing the north half of the paving, which was ten feet wide and the car fourteen feet long.

Petitioner's account of the accident was that when out on

the highway he had been driving forty to fifty miles; that he was slowing down before he came to the intersection; that he took his foot off the gas but did not put on the brake; that when probably one hundred twenty-five feet to one hundred fifty feet east of the east line of the intertion he first saw the decedent's car, then twenty-five feet to fifty feet from the north line of the intersection, meaning by the north line of the intersection twenty-five feet north of the paving, which would place the decedent's car fifty to seventy-five feet north of the paving; that decedent's car was traveling at about ten miles an hour (R. 23-24); that he slowed down to about twenty-five to thirty miles an hour; that decedent's car was coming so slowly that he thought it would stop before coming to the highway (R. 25); that decedent's car was close to the paving when he first realized it was not going to stop; that he put on his brakes and turned to the left to avoid the collision; that he was thirty to forty feet from the other car when he put on his brakes; that he also sounded his horn. (R. 26-27).

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

I.

In reversing the judgment of the United States District Court for the District of South Dakota, Southern Division.

II.

In construing the Uniform Motor Vehicles Act to the effect that a stop at a stop sign on a crossroad leading to an arterial highway constitutes compliance with the law, regardless of whether an effective observation at such point may be made.

III.

In construing the Uniform Motor Vehicles Act to the effect that a motorist entering such arterial highway has

the right-of-way over vehicles on such arterial highway coming from his right.

IV.

In stating the duty as to due care of a motorist about to enter an arterial highway.

V.

In applying the doctrine of the last clear chance.

THE LAW

The purpose of the Uniform Motor Vehicles Act is manifest. Interstate traffic in automobiles is now commonplace. It is highly undesirable that every time a motorist crosses a state line he should be confronted by a new and different set of traffic regulations. So the Uniform Motor Vehicles Act was proposed for general adoption to correct this confusion. Uniformity of interpretation is highly desirable. This is expressed in Section 69 of Chapter 251 of the South Dakota Session Laws of 1929, wherein the South Dakota Legislature adopted the Act. The same provision appears in Section 90 of the Act as proposed for general adoption. (11 Uniform Laws Annotated 73).

Therefore, judicial construction of important provisions of this Law is a matter of more than merely local importance. Any construction, particularly by a Federal Court, which is at variance with the general current of authority, tends to introduce confusion into regulations designed to be uniform.

So far as concerns interstate motor traffic, no subject could be of greater public interest than regulations concerning arterial highways. Practically all such interstate traffic is upon arterial highways. Hence, confusion in the law with reference to use thereof defeats the precise purpose for which the Uniform Motor Vehicles Act was proposed and widely adopted.

We earnestly urge that the decision of the Circuit Court of Appeals in this case will inevitably produce such confu-

sion. It is not only at variance in several important particulars with the apparent holdings of the South Dakota Supreme Court, but it is also at variance with the decided weight of authority of courts generally. We will endeavor to point these out sufficiently to show the reasons why Certiorari should be granted.

RIGHT OF WAY

The majority of the Circuit Court held that a motorist entering an arterial highway has the right of way over vehicles approaching on the arterial highway from his left. This was based on Section 19 of Chapter 251 of the South Dakota Session Laws of 1929, now Section 44.0318 of the South Dakota Code of 1939. The applicable portion thereof reads:

> "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right except as otherwise provided in Section 20. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder."

The statute with reference to arterial highways is Section 22 of the same Act, now Section 44.0321 of the 1939 Code. This reads:

> "The State Highway Commission with reference to state highways and local authorities with reference to highways under their jurisdictions are hereby authorized to designate main traveled or through highways by erecting at the entrances thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highways, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. All such signs shall be illuminated at night or so placed as to be illuminated by the headlights of an approaching vehicle or by street lights."

Construing these two statutes together the majority of the Circuit Court held that once a motorist makes a stop in obedience to a stop sign, he has the right of way provided by Section 19 over vehicles approaching from his left. This followed certain Minnesota cases which appear to hold this.

This is unquestionably of major importance. The result reached is not at all in conformity with the public conception of an arterial highway. The Court should have construed these two statutes together to give effect to the obvious purpose of the statutory authorization for establishment of arterial highways. This is in clear recognition of the requirements of modern rapid transit in motor vehicles. The provision is made so that there will be set apart specified highways for through traffic. This, of course, does not mean that motorists from intersecting highways can enter only at their own peril, but the purpose clearly is so that the motorist on the through highway can proceed with a reasonable sense of security against cars entering from intersecting roads. The requirement for a full stop necessarily implies that the motorist entering from an intersecting road will make careful observations in connection with the stop, and will not enter until such observations assure him that he can do so with reasonable safety, deferring to a reasonable extent to traffic on the through highway.

That, as a matter of fact, is what we all expect when we are driving on an arterial highway. The average motorist would be astounded if told that he must be prepared to give the right of way to any vehicle entering from his right; that it is incumbent upon him to anticipate that any vehicle from his right which in normal course of travel would get into the intersection at the same time he would, has the right to proceed, and that it is his duty to slow down and give the right of way to such vehicle.

Yet that is the effect of the decision of the Circuit Court of Appeals in this case. If it stands it will introduce into judicial construction of important provisions of the Uni-

form Act an element which will practically destroy the entire purpose of establishment of arterial highways.

The correct view would be to give a broad construction of the arterial highway statute, in full conformity with its obvious purpose and in conformity to the public understanding thereof. The correct conception is set forth in the following decisions:

Findley v. Brittenham, 199 Minn. 197, 271 N. W. 449.

Gumm v. Koepke (Wis.—State Report not available) 278 N. W. 447.

Hittle v. Jones, 217 Ia. 598, 250 N. W. 689.

Marciniak v. Sundeen, 278 Mich. 407, 270 N. W. 729.

Miller v. Stevens, 63 S. D. 10, 256 N. W. 152.

Paluczak v. Jones, 209 Wis. 640, 245 N. W. 655.

Pettera v. Collins, 203 Wis. 81, 233 N. W. 545.

Pulford v. Mouw, 279 Mich. 376, 272 N. W. 713.

Shoniker v. English, 254 Mich. 76, 235 N. W. 866.

Svenson v. Vondrak, 200 Wis. 312, 227 N. W. 240.

Wood v. Branning, 215 Ia. 59, 244 N. W. 658.

South Dakota Code of 1939 (cited SDC), Section 44.0321, Vol. 3, Page 199.

POINT AT WHICH MOTORIST ENTERING ARTERIAL HIGHWAY IS REQUIRED TO STOP

The question presented is: a stop sign on a crossroad entering an arterial highway is so far from the intersection that a motorist from that point would have practically no view of the arterial highway approaching the intersection. In such case does such a motorist comply with the law when he stops at the stop sign, and makes no other stop? The Circuit Court of Appeals answered this question in the affirmative. We contend this is clearly incorrect.

The applicable statute, being Section 22 of Chapter 251 of the South Dakota Session Laws of 1929, now Section 44.0321 of the South Dakota Code of 1939, has previously

been quoted in full. It requires that, when a highway has been designated as arterial by erection of stop signs at entrances thereto from intersecting highways, there is required "a full stop before entering or crossing such designated highways."

The precise point of the stop is not specified. In view of the obvious purpose of the statute it must mean a stop at a point where the motorist can make reasonably adequate observations of traffic on the arterial highway. This is the construction such a statute has almost uniformly received.

Gumm v. Koepke (Wis. State Report not available) 278 N. W. 447.
Hittle v. Jones, 217 Ia. 598, 250 N. W. 689.
Marciniak v. Sundeen, 278 Mich. 407, 270 N. W. 729.
Paluczak v. Jones, 209 Wis. 640, 245 N. W. 655.
Pettera v. Collins, 203 Wis. 81, 233 N. W. 545.
Pulford v. Mouw, 279 Mich. 376, 272 N. W. 713.
Shoniker v. English, 254 Mich. 76, 235 N. W. 866.
Svenson v. Vondrak, 200 Wis. 312, 227 N. W. 240.

The South Dakota Supreme Court in *Miller v. Stevens*, 63 S. D. 10, 256 N. W. 152, indicates the same view.

This is a question of major importance in the construction of the Uniform Motor Vehicles Act. As chief arteries of motor traffic are now constructed, presence of filling stations or other structures frequently precludes placing the stop sign up close to the intersection—just as it did here. It is of real interest that the purpose of the Uniform Act as to arterial highways be preserved. The statute in question has as its clear objective a requirement that a stop be made where traffic conditions can be observed. If the interpretation of the majority of the Circuit Court of Appeals stands, the law as to this point will be badly confused. The cases cited by the Circuit Court to sustain its position are not applicable. They do not hold a stop sufficient when made at a point where the stop would be entirely ineffective. The Circuit Court's decision is the first that introduces into the Uniform Motor Vehicle Act any such construction of the law.

CONDUCT OF MOTORIST APPROACHING AN INTERSECTION

The Circuit Court reached the conclusion that Respondent's decedent may not have been negilgent. This conclusion was reached on the theory that she could assume Petitioner was not driving at an unlawful rate of speed and that she "may have seen the defendant approaching and believed because of his distance away, that she had ample time to cross to the south side of the pavement." It was undisputed that decedent was driving at only five to ten miles and could have stopped within ten feet.

This sets forth a requirement on a motorist entering an intersection that is much more lax than that stated by the South Dakota Supreme Court. The law of South Dakota is set forth in *Jamieson v. Gerth*, 61 S. D. 514, 249 N. W. 921. This directly rules that such a motorist may not under such circumstances rely on an observation and a mental calculation when an approaching vehicle is a considerable distance from the intersection, but that when he has once seen such a vehicle he must look again before finally committing himself to the zone of danger. This decision was followed in *Anderson v. Huntwork* (not yet published in South Dakota reports) 284 N. W. 775. Precisely the same rule was earlier stated in *Miller v. Sioux Falls Traction System*, 53 S. D. 649, 222 N. W. 270.

This question concerns a rule of law that controls the daily habits of the thousands of motorists in the jurisdiction. The highest Court of the state, in the decisions cited, has seen fit to adopt a construction of the law which requires a high degree of care from a motorist entering an intersection. The Circuit Court in this decision construes the law as requiring a much lesser degree of care. If the decision stands it will result in the Federal Courts of the jurisdiction applying an entirely different rule than that which is in force in the State Courts of the jurisdiction.

LAST CLEAR CHANCE

The majority of the Circuit Court held that, even if Re-

spondent's Intestate was guilty of contributory negligence, the case could have been submitted to the jury on the doctrine of the last clear chance. This was on the theory that Petitioner testified that he first realized Decedent was not going to stop when her car was ten to fifteen feet to the north of the paving, that on his own testimony he must have been several times as far away as that, and yet he did not apply his brakes until he was thirty or forty feet from the point of collision; further, that he could have turned to the right of Decedent's car. This states and applies the doctrine of the last clear chance entirely differently than it has been stated and applied by the South Dakota Supreme Court. *Miller v. Sioux Falls Traction System*, 44 S. D. 405, 184 N. W. 233; *McFarland v. Chicago, Milwaukee and St. Paul Railway Company*, 51 S. D. 85, 212 N. W. 493; *DeNoma v. Sioux Falls Traction System*, 39 S. D. 10, 162 N. W. 746. It is also entirely different than it has been previously stated and applied by the Circuit Court of Appeals of the Eighth Circuit. *Denver City Tramway Company v. Cobb*, 164 Fed. 41; *McFarland v. Chicago, M. & St. P. Ry. Co.*, 51 S. D. 85, 212 N. W. 493; *Walker v. East St. Louis Street Railway Company*, 25 Fed. (2) 579; *Wheelock v. Clay*, 13 Fed. (2) 972.

The error of the majority of the Circuit Court in applying the doctrine is obvious from the following statement in the opinion:

> "This case might have been submitted to the jury on the theory that it was the duty of the defendant in driving his automobile upon the highway to exercise reasonable care by keeping a lookout ahead, by driving at such speed and in such manner as to have his automobile under reasonable control so as to be able to stop at the intersection when he saw, *or by the exercise of ordinary care could have seen*, the decedent in the act of driving into said intersection and in a position of peril, and if the defendant had used such care he could have stopped, or reduced his speed, or turned to the right and thus have avoided the accident, but failed to do so, then the plaintiff was entitled to recover."

This introduces into the doctrine a vital feature which has been entirely rejected by the South Dakota Supreme Court. Under the local decisions above cited the doctrine applies only when it is shown that the defendant did actually himself observe a clear chance to avoid the collision, and did not take advantage of it. To hold, as the majority of the Circuit Court held, that it is sufficient if the defendant by the exercise of reasonable care would have observed plaintiff's peril, broadens the doctrine so it would apply to nearly every autmobile collision case.

Further, the facts were not such under the local decisions as to make the doctrine applicable. It is undisputed that the front end of Decedent's car had reached only about the center line of the paving when the crash occurred. The rear-end would necessarily have been at the north edge of the paving, entirely obstructing Pettioner's right hand half of the paving. If he had attempted to go to the right, he would necessarily have gone off the paving and onto the north shoulder. This would mean that, if, as would obviously be likely, Decedent should see him and stop before going onto the paving, he would crash into her car and cause an accident which would not otherwise occur. Petitioner's testimony at R. 23-27 is not such as to give any basis whatever for a conclusion that would make the doctrine applicable.

This is also important. Under the rule promulgated by the South Dakota Supreme Court, the doctrine of the last clear chance is rarely applicable to an automobile accident case. This is obvious from the very few decisions in which that Court has dealt with the doctrine in recent years. *On a very careful search we do not find a single decision of the South Dakota Supreme Court, rendered within the last fifteen years, that has sustained a recovery for the plaintiff on the basis of the doctrine of the last clear chance.*

The decision of the majority of the Circuit Court is obviously such that if it stands this doctrine will be the basis for recovery in a large portion of automobile accident cases which get into the Federal Court of the jurisdiction.

PROPRIETY OF GRANTING WRIT IN THIS CASE

It is true that the judgment of the Circuit Court of Appeals directs a new trial in the District Court and that, therefore, the litigation is not finally terminated. However, it is proper to grant the writ in such an instance when it is to the public interest to prevent confusion entering into the construction of the law in Federal Courts.

Chicago, Burlington and Quincy Railroad Company v. Willard, 220 U. S. 413, 31 Sup. Ct. Rep. 460.

Spiller v. Atchison T. & S. F. Railway Company, 253 U. S. 117, 40 Sup. Ct. Rep. 466.

Gay v. Ruff, 292 U. S. 25, 54 Sup. Ct. Rep. 608.

Such is the case here. In view of the almost universal use of motor vehicles, the law regulating use of the same affects the daily lives of most people. To refuse the writ because the case has not reached a final judgment as between the litigants would in all probability mean that the errors in the Circuit Court decisions would never be corrected by this Court, and that the same would stand for years as the law of the circuit, with resulting confusion as to the law regarding use of arterial highways, and with the Federal Courts in South Dakota applying entirely differently than the State Courts the doctrine of the last clear chance, and the rule of law as to the degree of care required by a motorist entering an intersection.

THE FACT THAT THE CIRCUIT JUDGES DIVIDED AND THAT THE DECIDING VOTE WAS BY A DISTRICT JUDGE CONSTITUTES REASON FOR GRANTING THE WRIT

This is directly stated in *Forsythe v. City of Hammond,* 166 U. S. 506, 17 Sup. Ct. Rep. 665. Pointing out the reasons for granting certiorari, this Court said, among other things:

"As the Courts of Appeal would often be constituted

of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the question involved."

SUMMARY

There are strong reasons for granting the writ in this case.

It is necessary:

First, to prevent a conflict between the Federal Courts and the South Dakota Courts in applying the law as to the last clear chance and as to the degree of care required of a motorist approaching an intersection, and probably also as to other questions involved.

Second, to prevent confusion in the Eighth Circuit in the construction of the Uniform Motor Vehicles Act, particularly as to the requirement for a stop by entering motorists, and as to right of way at intersections.

It is, therefore, respectfully urged that this case is such as to call for review by this Court.

Respectfully submitted,

BLAINE SIMONS,
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Attorneys for Petitioner.

FILED
NOV 5 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

1940 TERM

No. 530

CHARLES RICHMAN, *Petitioner,*

vs.

ANNE NIELSEN, *as* Administratrix of the Estate of Pearl G. Nielsen, Deceased, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

1940 TERM

No.....

CHARLES RICHMAN, *Petitioner,*

vs.

ANNE NIELSEN, *as* Administratrix of the Estate of Pearl G. Nielsen, Deceased, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

For the sake of brevity, we refer this Court for a Statement of Facts to the majority opinion as rendered by the Circuit Court of Appeals in this case. This statement of facts is not controverted in the dissenting opinion. See *Nielsen, etc. vs. Richman,* 114 Fed. (2) 343, Advanced Sheets Federal Reporter, October 14, 1940.

II.

THIS IS NOT A CASE FOR THE GRANTING OF A WRIT OF CERTIORARI

See *Chicago & Northwestern Railroad vs. Osborne,* 146 U. S. 354, 13 Sup. Ct. Rep. 281, where the headnote states the rule:

> "The Supreme Court will not issue a writ of certiorari to review a judgment of the Circuit Court of Appeals reversing a judgment of the Circuit Court and remanding the cause for further proceedings; for such a judgment is not final, and the Supreme Court is, therefore, without jurisdiction to revise it."

See also the case of *Forsyth vs. City of Hammond,* 166 U. S. 506, 17 Sup. Ct. Rep. 665. This case is cited by Petitioner. This Court in that case said:

> "In order that this Court may properly grant a writ of certiorari that the decision of the Circuit Court of Appeals must be in that class 'in which the decision of that Court is declared a finality'."

Except in extraordinary cases, the writ is not issued until final decree.

> *American Constr. Co. vs. Jacksonville, T. & K. W. R. Co.,* 148 U. S. 372, 378, 384, 37 L. Ed. 486, 489, 491, 13 Sup. Ct. Rep. 758.
>
> *The Three Friends,* 166 U. S. 1, 49, 41 L. Ed. 897, 913, 17 Sup. Ct. Rep. 495.
>
> *The Conqueror,* 166 U. S. 110, 113, 41 L. Ed. 937, 939, 17 Sup. Ct. Rep. 510.
>
> *Denver v. New York Trust Co.,* 229 U. S. 123, 133, 57 L. Ed. 1101, 1120, 33 Sup. Ct. Rep. 657.

This is not a case where a final judgment was rendered. Petitioner never introduced any evidence in the Lower Court. The Circuit Court of Appeals simply directed that

> "The case is reversed and remanded for a new trial."

This Court has never adopted a rule, as inferred by Petitioner, that where a decision was rendered by a District Judge sitting as a Judge of the Circuit Court of Appeals, and approved by one of the other regular Circuit Judges, that because of a dissent by one Circuit Judge, that the fact of such a dissent is the basis for granting certiorari. A District Judge, when so sitting, is a Judge of the Circuit Court of Appeals, if otherwise qualified.

See U. S. C. C. A. 28, Section 216, where the Statute states that when District Judges so sit, that they "*sit as Judges of the Circuit Court of Appeals* within their respective Circuits." The granting of the writ in the case of *Forsyth vs. City of Hammond* was not on that ground.

See Rule 38 of the Rules of this Court, and Subdivision 5 thereof, where it is stated that the writ

> "Will be granted only where there are special and important reasons therefor."

This is not a case in the class provided in Subdivision 5.

To grant the writ in this case would be to circumvent the purpose of the law creating the Circuit Court of Appeals, or as said by Judge Brewer in *Chicago & Northwestern Railroad Co. vs. Osborne, supra,*

> "If carelessly exercised, might defeat the very thought and purpose of the Act creating the Circuit Court of Appeals. **** It might burden the docket of this Court with cases which it was the intent of Congress to terminate in the Circuit Court of Appeals."

The Petitioner should not complain. This case was started in the Courts of South Dakota. He removed the case from the State Court. See printed transcript of record in Circuit Court of Appeals, pages 67-79. Removal was only on the ground of diversity of citizenship. The application for the writ should be denied.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS SQUARES WITH THE DECISION OF ALL COURTS WHERE THE QUESTION HAS BEEN CONSIDERED AND SQUARES WITH THE LANGUAGE OF THE SOUTH DAKOTA UNIFORM MOTOR VEHICLES ACT, SECTION 44.0321, SDC 1939, AND SECTIONS 44.4318 AND 44.0303, AND SUBDIVISION 11 THEREOF, SDC 1939.

The South Dakota Legislature in adopting the Uniform Motor Vehicles Act, omitted from Section 44.0321, the following:

> "Such signs shall be placed as nearly as practicable and stops shall be made at the place where such cross-streets meets the prolongation of the nearest property line of such highway."

In every case where a Court has been called upon to construe the Uniform Motor Vehicles Act or an Act similar to the South Dakota Act, Section 44.0321, where the place of stopping is not designated, the Courts construction is the same as that adopted by the Circuit Court of Appeals. No decision to the contrary can be found and none has been cited by Petitioner.

For the language of the Uniform Motor Vehicles Act, with the part included, that is omitted in the South Dakota Statute, see Uniform Laws Annotated, under Uniform Motor Vehicles Act, page 46, Section 48, and Martindale—Hubbell Law Directory, Volume 2, Law Digest, for the year 1940, under the title "Uniform Act Regulating Traffic On Highway," Section 48.

The following cases sustain the opinion of the Circuit Court of Appeals:

Dickel vs. Mathers, 213 Ia. 76, 238 N. W. 615.
McCulley vs. Anderson, 119 Neb. 105, 227 N. W. 312.
Bell vs. Pickett, 178 Minn. 540, 227 N. W. 854.
Johnson vs. Selfe, 190 Minn. 269, 251 N. W. 525.
Jacobsen vs. Ahsay, 188 Minn. 179, 246 N. W. 690.
Anderson vs. Detroit Motor Bus Co., 239 Mich. 390, 214 N. W. 172.

The South Dakota Supreme Court has never construed the Statute but has affirmed the principle as announced in the decision of the Circuit Court of Appeals.

Litz vs. Arbeiter, 57 S. D. 481, 233 N. W. 914.
Pfleger vs. Wilhelm, 65 S. D. 646, 274 N. W. 872.
Pooley vs. Leath, 62 S. D. 554, 255 N. W. 153.
Cameron vs. Miller, 43 S. D. 429, 180 N. W. 71.
McKay vs. Pennington County, 57 S. D. 39, 230 N. W. 225; Id. 52 S. D. 36, 216 N. W. 577.
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Ziegler vs. Ryan, 65 S. D. 110, 271 N. W. 767.
Campbell vs. Jackson, 65 S. D. 154, 272 N. W. 239.

The principle has been approved by this Court in the case of *Pokora vs. Wabash Railroad Co.,* 292 U. S. 98, 54 S. Ct. Rep. 580, in an able opinion by Judge Cardozo. There was a limited view. The Court said:

> "A jury, *but not the Court,* might say that with faculties thus limited, he should have found some other means of assuring himself of safety before venturing to cross. **** What is suitable for the driver caught in a mesh where the ordinary safeguards fail him is for the judgment of the Jury."

The following cases are in point under the same or similar circumstances. The issue of contributory negligence is for the jury as held by the Circuit Court of Appeals.

Putnam Memorial Hospital vs. Allen, 34 Fed. (2) 927. (Circuit Court of Appeals Second Circuit.)

Pline vs. Parsons, 231 Mich. 466, 204 N. W. 131., the facts were very similar. The Michigan Court said:

> "Having the opinion that Deceased was not bound at his peril to discover Defendant's car was approaching at an excessive and unlawful speed, we decline to hold Deceased guilty of contributory negligence as a matter of law in attempting in such circumstances to cross the trunk line."

Adams vs. Canfield, 263 Mich. 666, 248 N. W. 800.

Calhoon vs. D. C. & E. Mining Co., 202 Mo. App. 564, 209 S. W. 318.

Page vs. Cudahy Packing Co., (Cal.) 87 Pac. 913.

Primock vs. Goldberg, 161 Minn. 160, 200 N. W. 920.

Nelson vs. Klemm, 210 Wis. 432, 245 N. W. 657.

Pilcher vs. Lodwig, 194 Wis. 535, 217 N. W. 320.

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Parker vs. England, 266 Mich. 467, 254 N. W. 169.

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Brun vs. Hammermeister, (Wash.) 14 Pac. (2) 700.

Clark vs. DeBeer, (La. Ap. 1939) 188 So. 517.

Crocker vs. Johnson, (Cal.) 94 Pac. (2)214.

Taxi Cab Co. vs. Ottenritter, 151 Md. 525, 135 Atl. 587.

Zurn vs. Whatley, 213 Wis. 361, 251 N. W. 435.

LeChance vs. Meyer, 98 Vt. 491, 129 Atl. 172.

Briggs vs. Koyer, 138 Cal. Ap. 487, 32 Pac. (2) 649.

Stryker vs. Hastie, 131 Ore. 283, 282 Pac. 1087.

Hayward vs. Wolbrecht, (1940) 293 N. W. 246 (Minn.).

Norling vs. Stempf, 293 N. W. 250 (1940 Minn.).

Kraus vs. Saffert, 293 N. W. 253. (1940 Minn.).

In the latter case the Court said:

"Plaintiff is not to be held guilty of contributory negligence in not seeing Defendant, who was out of sight when a reasonable observation was made, and whose unanticipated and excessive speed made unsafe a crossing that appeared to be safe. **** There is no rule of law requiring the driver of a car to look a second time after he has determined by reasonable observation that it is safe to cross an intersection. Due care is not determined by the number of times the driver looked, or how often, or when, or from where."

IV.

PETITIONER'S POINTS 2 AND 3, PAGES 5 AND 6, AND CASES CITED, HAVE NO APPLICATION TO THE FACTS IN THIS CASE AND ARE NOT CONTRARY TO THE DECISIONS OF THE CIRCUIT COURT OF APPEALS.

No Court, as a matter of law, can determine the point when an observation can most effectively be made, when two moving vehicles at different speeds are approaching an obstructed or partially obstructed intersection. That is for the jury. The cases cited under said two points, are not in point.

In *Jameson vs. Gerth,* 61 S. D. 514, 249 N. W. 921, the Plaintiff claimed to have seen an approaching car three-fourths of a block away, but made no stop. There were no obstructions. The Plaintiff drove into the side of Defendant's car. This is not in point.

Anderson vs. Huntwork, (S. D.) 284 N. W. 775. The Plaintiff said:

"I could see a block. My view was unobstructed. I could see the whole block. There was nothing to block my view at all. **** The evidence indicates Respondent was driving along without paying any attention to cars approaching the intersection."

In *Gumm vs. Koepke,* (Wis.) 278 N. W. 447, the Court held that contributory negligence was a jury question.

In *Hittle vs. Jones,* 217 Ia. 598, 250 N. W. 698, we find the Iowa law the reverse of the South Dakota law in reference to burden of proof in case of contributory negligence. In Iowa it is on the Plaintiff. In South Dakota it is on the Defendant. In Iowa, under the present statute the party on the arterial has the absolute right-of-way.

In the case of *Paluczka vs. Jones,* 245 N. W. 655, the decision is based on a particular statute relative to speeds. The deceased did not stop at the stop sign and did not have the right-of-way.

In *Miller vs. Stevens,* 63 S. D. 10, 254 N. W. 152, the South Dakota Court did not even touch on the question involved here.

Not a case has been cited contrary to the decision of the Circuit Court of Appeals in this case. None is cited even in the dissenting opinion. There has been "uniformity of interpretation" in the construction of the law in reference to right-of-way under statutes the same or similar to the South Dakota statute. There has likewise been uniformity in holding under similar facts that contributory negligence is a matter for the jury, and not for the Court, regardless of the language of the statute. No question is involved in this case that concerns anyone other than the litigants themselves. It is important to the litigants only, and no one else. The rule applied by the Circuit Court of Appeals squares with all decisions, State and Federal.

V.

DOCTRINE OF LAST CLEAR CHANCE

The doctrine of last clear chance is a well known and well established doctrine. It is recognized in the State of South Dakota, as shown by the cases cited by Petitioner, and by the quotations appearing in Judge Bell's opinion. Its application to the facts in the case at bar is in accord with the South Dakota decisions. There was no attempt by

the Circuit Court of Appeals to establish any new rule of law applicable to the doctrine of last clear chance. That being the case, the application of the doctrine is left to be applied to the circumstances in each particular case, and the facts in each particular case. The conceded facts and circumstances, as testified to by the Petitioner, appear in the printed record, 24-25:

> "Q. And this other car (referring to decedent's car) was coming into that intersection without any visible signs of stopping there?
>
> A. That is right.
>
> Q. When you first saw it, you took your foot off the gas and you didn't see that that car was going to stop at all, it didn't slow its speed down?
>
> A. No."

The evidence shows that Petitioner drove his car to the wrong side of the highway, where the collision occurred. The photographs show that had he stayed on his side of the highway, he had ample space to pass and coulld have easily avoided the accident.The general doctrine was directly applicable.

See annotations in 92 A. L. R. 28, under the case of *Smith vs. Gould,* and 119 A. L. R. on page 1041. There is a complete review of the authorities and of the doctrine; also a classification of the decisions. The doctrine is directly applicable under the facts here.

See also 5 N. C. C. A. (N. S.) 83.

See *Clark vs. Boston & Main R. R.,* 87 N. H. 36, 173 Atl. 368, where the Court, discussing the rule, said:

> "The circumstances as disclosed by the evidence may be such that the jury would be justified in disregarding direct testimony of lack of actual knowledge and find in spite of that testimony that the one to be charged would in actual fact have knowledge of the other's presence and of the latter's want of appreciation of impending peril."

This Court approves the doctrine of last clear chance. See *Kansas City Southern Railroad Co. vs. Ellzey*, 275 U. S. 236, 48 Sup. Ct. Rep. 80 and the much quoted definition enunciated by Justice Stone.

See *Chunn vs. City & S. Railroad Co.*, 207 U. S. 302, 28 Sup. Ct. Rep. 63.

SUMMARY

No reason exists for granting the writ in this case.

First: The judgment is not a final judgment. There is nothing extraordinary about this case.

Second: There is no conflict between the decisions of the Federal Courts and the decisions in South Dakota.

Third: The decisions in the State Courts of the Eighth Circuit all square with the opinion rendered by the Circuit Court of Appeals and square with the language of the South Dakota Act.

Fourth: The Circuit Court of Appeals in its decision did not attempt to establish any new rule of law applicable to the doctrine of last clear chance contrary to South Dakota decisions or any other decisions. It left to the Trial Court the right to instruct under the doctrine, as announced by the South Dakota Court and the determination of the question by the jury.

No reason exists why the Writ of Certiorari should be issued in this case.

Respectfully submitted,

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